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No. 79-1116

In the Supreme Court of the United States

OCTOBER TERM, 1979

OSCAR MCINNIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 28-39) is reported at 601 F. 2d 1319. The opinion of the district court (Pet. App. 43-50) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 40) was entered on September 10, 1979. A petition for rehearing was denied on November 19, 1979. On December 4, 1979, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to January 18, 1980; the petition was filed on January 17, 1980. The jurisdiction of this Court is invoked under 18 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether counts of an indictment alleging that petitioner gave false testimony before a grand jury should have been dismissed because the conduct being investigated was ultimately found not to have constituted a federal offense.

2. Whether the false declaration counts should have been dismissed because of alleged prosecutorial misconduct regarding petitioner's appearance before the grand jury.

STATEMENT

1. On June 7, 1978, petitioner was indicted in the United States District Court for the Southern District of Texas for conspiring to kidnap Noe Villanueva, in violation of 18 U.S.C. 1201. In a superseding indictment filed two months later, petitioner was charged, in addition to the count alleging conspiracy to kidnap, with six counts of false declarations in violation of 18 U.S.C. 1623. Following a hearing, the district court dismissed the entire indictment on the ground that the conspiracy alleged did not constitute a federal offense and that the false declarations were therefore not material to the grand jury's inquiries. The district court added that the government's conduct in bringing petitioner before the grand jury violated fundamental fairness and the Justice Department's internal guidelines (Pet. App. 43-50). The court of appeals affirmed the dismissal of the conspiracy count but reversed as to the false declaration counts, remanding that portion of the case for trial (Pet. App. 28-39).

2. Petitioner was the District Attorney for Hidalgo County, Texas (Pet. App. 29). The indictment alleged that petitioner and co-defendant Patricia Parada planned to arrange for the release of Villanueva, Parada's ex-husband, from the Hidalgo County Jail (*id.* at 29-30). Villanueva was to be lured by Parada into Mexico, where he would be kidnapped and killed by corrupt police authorities recruited by one Daniel Rodriguez (*id.* at 30). The kidnapping never occurred, however, because Rodriguez and Villanueva were working with the police and had been equipped with recording devices during their conversations with petitioner and Parada (*id.* at 30, 43). The false declaration charges against petitioner arose from statements he made to the grand jury investigating the planned kidnapping, in which he denied his involvement in the scheme (*id.* at 31).

ARGUMENT

Petitioner contends (Pet. 7-26) that the court of appeals erred in reinstating the false declaration counts. First, he contends (Pet. 7-11) that the grand jury's investigation into the kidnapping scheme exceeded its jurisdiction. Second, he contends (Pet. 11-25) that the government abused the grand jury process and violated its own internal guidelines in connection with petitioner's appearance before the grand jury.

1. At the outset, we note that there is no need for the Court to consider petitioner's claim at this time. The ruling below places petitioner in the same position as if the district court had denied his motion to dismiss the false declaration counts. That is an interlocutory order that is not subject to pretrial appeal. See *United States* v. *MacDonald*, 435 U.S. 850, 853-854 (1978); *Cogen* v.

United States, 278 U.S. 221, 222-224 (1929). The same considerations that militate against interlocutory appeal of a motion to dismiss militate against review at this time of the court of appeals' reversal of a dismissal. If petitioner is acquitted at his trial, which has already been delayed by more than one year, there will be no need to consider his claim. If petitioner is convicted and his conviction affirmed, he will then be able to present to the Court all his contentions, including those made here, by seeking review of the final judgment. In short, petitioner's claim "is not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967).

2. In any event, there is no merit to petitioner's claim that the false declaration counts should not be reinstated because the grand jury lacked jurisdiction for the investigation that gave rise to those counts. The court of appeals ruled that the federal kidnapping statute, 18 U.S.C. 1201, does not apply where the kidnapping is to occur only after the victim has voluntarily crossed a state line, even if that interstate movement is induced by a deception in order to facilitate the kidnapping (Pet. App. 36). It thus held that the agreement alleged in this case did not constitute a federal offense and affirmed the dismissal of the conspiracy count (Pet. App. 32-37).

The fact that the conduct ultimately exposed may not constitute a federal offense, however, does not in any sense compel the conclusion that a grand jury is without jurisdiction to conduct an investigation of a conspiracy to kidnap. As the court of appeals noted (Pet. App. 37), the district court erroneously equated "what actually constitutes a crime with jurisdiction to investigate to determine if a crime has been committed." The possibility

that violations of federal law have occurred is sufficient authority for a grand jury investigation. A grand jury investigation is not to be limited by "forecasts of the probable result." *Blair* v. *United States*, 250 U.S. 273, 282 (1919). See *United States* v. *Calandra*, 414 U.S. 338, 343 (1974). The grand jury " 'can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.' " *United States* v. *Bisceglia*, 420 U.S. 141, 148 (1975), quoting *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643 (1950). See also *United States* v. *Williams*, 552 F. 2d 226, 230 (8th Cir. 1977). As the court below observed, this principle is an integral part of the grand jury system (Pet. App. 37):

> Because it is an investigatory agency, and because its primary function is to safeguard defendants from prosecution without probable cause, not to aid the government, the grand jury must necessarily be able to investigate activities that it might later decline to indict. See *In re Grand Jury Proceedings*, 5 Cir. 1977, 558 F. 2d 1177, 1179. A grand jury might, following an investigation, decide that a federal offense had likely been committed but refuse to return an indictment; it might decide that the conduct investigated was a state, but not a federal crime; or that the actions were not criminal. Unless the grand jury has such latitude, there is little reason for its existence, and it would be incapable of protecting citizens by exercise of its independent judgment.

The plot under investigation here involved interstate movement for the purpose of kidnapping and might well have been found to be a federal crime. Indeed, the grand jury did find that a federal crime was committed, and it was only the resolution of a difficult question of

statutory construction by the court of appeals that established that there was no federal violation. The plot was clearly a legitimate subject of inquiry by the grand jury, to which petitioner's false statements were material, and the fact that the conspiracy count was dismissed does not require dismissal of the false declaration counts. Perjury before a grand jury is not excused simply because the investigation does not result in an indictment.

3. Petitioner also asserts (Pet. 11-25) that dismissal of the false declaration counts is required because of alleged governmental misconduct, including violations of certain internal Department of Justice guidelines regarding the appearance before a grand jury of a "target witness." This contention is without foundation.

First, internal policies of the Department of Justice do not confer any rights on individuals, at least in the absence of exceptional circumstances not present in this case. As the court of appeals properly stated (Pet. App. 38), it was "not charged with enforcing internal governmental guidelines" and clearly it was not required to remedy the alleged violation in this case by dismissal of the indictment. See *United States* v. *Caceres*, 440 U.S. 741 (1979). In the present case, the violation alleged is primarily that the prosecutor violated Department of Justice guidelines by failing to append to petitioner's grand jury subpoena a printed form advising him of his Fifth Amendment rights and the general subject matter of the grand jury's inquiry (Pet. 25). However, as petitioner concedes (*ibid.*), he was fully advised of his rights and notified that he was a target of the investigation prior to giving his testimony (see Pet. App. 30 n.4). Thus the warnings specified in the guidelines were given, even if not in the particular manner that is customary.

It is clear that no constitutional problem is presented here, where petitioner was warned of his constitutional rights and advised that he was a "target." In *United States* v. *Washington*, 431 U.S. 181 (1977), this Court held that failure to advise a witness before a grand jury that he was a "potential defendant" did not require suppression of the witness's testimony. It is also clear that the warnings given here met all constitutional requirements as to content and timeliness. Warnings concerning Fifth Amendment rights, if required at all, need not be given in advance of a grand jury appearance, but are sufficient if administered, as in this case, in the presence of the grand jury. *Id.* at 190-191. Finally, even if the government's conduct in this case could be characterized as "unfair" in some manner, it is clear that petitioner was not entitled to challenge that conduct by committing perjury. See *United States* v. *Wong*, 431 U.S. 174, 180 (1977); *Bryson* v. *United States*, 396 U.S. 64, 72 (1969).

Contrary to petitioner's suggestion (Pet. 16-19), the holding below in no way conflicts with the Second Circuit's opinion in *United States* v. *Jacobs*, 531 F. 2d 87, vacated and remanded, 429 U.S. 909, aff'd on remand, 547 F. 2d 772 (1976), cert. dismissed as improvidently granted, 436 U.S. 31 (1978). In *Jacobs* the court of appeals dismissed a perjury indictment on the basis of its supervisory powers because, unlike petitioner, the witness had not been warned of her status as a target of the investigation prior to her testimony before the grand jury.[1] Similarly, there is no merit to petitioner's contention (Pet. 24-25) that this case conflicts with *United States* v. *Doss*, 563 F. 2d 265 (6th Cir. 1977). In *Doss* the court

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[1]Moreover, *Jacobs* did not establish a rule, but was simply a "one-time sanction to encourage uniformity of practice." 547 F. 2d at 773. See also *United States* v. *James*, 609 F. 2d 36 (2d Cir. 1979), cert. denied, No. 79-1115 (Feb. 25, 1980).

found that it was a violation of due process to question the defendant before the grand jury on a matter for which he had already been indicted by that body. Petitioner, however, does not claim that the indictment in this case had been issued at the time he testified. Although other evidence may have suggested to the grand jury that petitioner should have been indicted, his testimony could have had an important bearing on that decision. As the court of appeals observed, " '[a] grand jury's investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed' " (Pet. App. 39). See *United States* v. *Cuesta*, 597 F. 2d 903, 921 (5th Cir. 1979).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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